

MONTGOMERY COUNTY ETHICS COMMISSION

ADVISORY OPINION

June 10, 1998

A member of the Montgomery County Energy and Air Quality Committee (the “Committee”) asked the Commission for an advisory opinion, under §19A-7 of the Montgomery County Ethics Law, on the question of whether he or his law firm is prohibited from responding to a request for proposals (RFP) issued by the Department of Public Works and Transportation (DPWT) for services to assist the County in addressing electric industry restructuring. The requester also sought a waiver of any Ethics Law prohibition, if necessary.

Pertinent Facts

The requester provided the following pertinent facts:

1. The requester is an attorney with an area law firm.
2. The requester’s firm is active in restructuring efforts in the transportation and energy industries, including electric industry deregulation. The requester’s principal area of practice is energy law, which includes gas and electric restructuring.
3. The requester has received a letter from DPWT, addressed to the firm per his attention, in which DPWT stated that it is soliciting consultant services for electric utility deregulation and invited the firm to respond to an enclosed RFP.
4. The requester has been a member of the Committee since July 1997.
5. The Committee advises the Department of Environmental Protection (DEP) and County officials on air quality and other environmental matters, including electric restructuring matters.¹
6. The requester is a member of the Committee’s Task Force On Indoor Air Quality, and his efforts as a member of the Committee have been focused on indoor air quality.
7. During the requestor’s tenure, the Committee has discussed electric restructuring and indoor air quality, but not the need for, desirability, scope or other aspects of hiring an outside consultant to assist the County in electric restructuring matters.

¹ Although this statement may reflect accurately the Committee’s activities thus far during the requester’s tenure, the Montgomery County Code provides for the Committee to assist the County Executive and the County Council. See §18A-5(a). See also §18A-8(a) (“The Committee has the following duties: Advise the County Executive and the County Council of the activities of the Committee in furthering the goals of this Chapter and Chapter 3”).

8. DPWT anticipates that a roundtable discussion will commence in 1998, and a pilot program will begin on July 1, 2000.
9. Although the Committee advises the DEP and County officials on electric restructuring matters, the advice does not and will not relate to the scope, nature or implementation of any contract awarded in connection with the RFP.
10. The requester has not, as a member of the Committee, participated in the RFP process in any way, and the Committee will not have any authority over the DPWT contract.

Applicable Law

The Energy and Air Quality Committee Law.

The Committee is a creation of §18A-5 of the Montgomery County Code:

- (a) There is hereby established an Advisory Committee on Energy and Air Quality . . . to assist the County Council and the County Executive in carrying out the purposes of this Chapter and Chapter 3. The Committee consists of 15 members appointed by the County Executive, subject to confirmation by the County Council. One member must be designated by the Executive and confirmed by the Council to serve as chair of the Committee. Appointees must be citizens of the County who are technically knowledgeable and interested in energy and air quality.

* * *

- (b) Members of the Committee serve without compensation Section 18A-8 of the Code gives the Committee the following duties
 - (a) Advise the County Executive and the County Council of the activities of the Committee in furthering the goals of Chapter [18A - Energy Policy] and Chapter 3 [Air Quality Control];
 - (b) Develop recommendations to promote and implement immediate and long-range energy consciousness in all segments of the community;
 - (c) Comment on or assist in developing programs to meet air quality standards and to promote healthy indoor and outdoor air quality;
 - (d) Identify areas and methods to encourage voluntary participation in energy conservation efforts and air quality improvements;
 - (e) Educate the public and private sectors about the efficient use of energy and its direct benefits for improved air quality;
 - (f) Carry out such other duties as may be assigned from time to time by the County Executive and the County Council to assist in fulfilling the purposes of this Chapter.

The Montgomery County Ethics Law.

The request implicated several provisions of the Montgomery County Ethics Law. Section 19A-12(b) prohibits a public employee from: (1) being *employed*² by or owning more than one percent of any *business*³ that negotiates or contracts with the *County agency*⁴ with which the public employee is affiliated; or (2) holding any employment relationship that would impair the impartiality and independence of the public employee.⁵ For these purposes, “public employee” includes “any person appointed by the County Executive or County Council to a board, commission, committee, task force or similar body, whether or not . . . the person is compensated for serving on the body”⁶

Section 19A-11(a)(1)(B) prohibits a public employee from participating, as a public employee, in any matter that affects, in a manner distinct from its effect on the public generally, any business in which the public employee has an economic interest.⁷

Section 19A-14(a) prohibits a public employee from intentionally using the prestige of his or her office for private gain or the gain of another.

Section 19A-8 authorizes the Commission, after receiving a written request, to grant waivers of these prohibitions if the Commission makes certain findings.

3. The Montgomery County Procurement Law.

Although the requester understandably inquired only about the inhibitions of the Ethics Law, the request also implicates §11B-52(a) of the Montgomery County Procurement Law. That law prohibits a contractor from employing certain public employees while having a contract with the County:

Unless authorized by law or the Ethics Commission under Chapter 19A, a person while engaged in a procurement matter with the County must not employ or offer to employ a public employee if the duties of the public employee include significant participation in the procurement matter. Public employee, employ, and significant participation as used in

² “*Employment or employ* mean engaging in an activity for compensation.” §19A-4(g).

³ “*Business* means any for-profit enterprise, including a corporation, general or limited partnership, sole proprietorship, joint venture, association, firm, institute, trust, or foundation.” §19A-4(b)

⁴ “*County agency*” includes “any board, commission, committee, task force, or similar body appointed by the County Executive or County Council.” §19A-4(a)(2).

⁵ This prohibition is buttressed by §19A-13, which prohibits a former public employee from: (a) accepting employment or assisting any party, other than a County agency, in a case, contract, or other specific matter for 10 years after the last date the employee significantly participate in the matter as a public employee; and (b) for one year after the effective date of termination from County employment, from entering into any employment understanding or arrangement (express, implied, or tacit) with any person or business that contracts with a County agency if the public employee significantly participated in regulating the person or business or had official responsibility regulated public utility).

⁶ §19A-4(m)(3)(A).

⁷ “*Interest*” or *economic interest* means any source of income or any other legal or equitable economic interest . . . which is owned or held, in whole or in part, jointly or severally, directly or indirectly.” §19A-4(j).

this section are defined in Chapter 19A.8

Conclusion & Advice

Applying the applicable law to the pertinent facts presented by the requester, the Commission concluded:

1. A member of the Committee is a “*public employee*” for the purposes of the County Ethics Law and the County Procurement Law;
2. However, because the Committee will play no part in the award or administration of the consultant contract, the requester would not be an employee of a “*business*” that contracts with the County agency with which the requester is affiliated as a public employee and his duties as a member of the Committee would not include significant participation in the procurement of electric utility deregulation consultant services.
3. The facts presented did not suggest that the requester had or will use the prestige of his office as a member of the Committee for his private gain or the gain of another. Neither do they indicate that his private employment would impair his impartiality and independence as a member of the Committee, as long as he recuses himself from any Committee discussion or action regarding electric utility deregulation if he or his firm obtain the consultant’ s contract with the County.

Therefore, the Commission advised the requester that neither the Ethics Law nor the Procurement Law prohibited him or his firm from submitting a proposal in response to the RFP for consultant services for electric utility deregulation and, if selected, entering into a contract to perform those services. However, the requester also was advised that unless he obtains a waiver he must recuse himself from any Committee discussion or action regarding electric utility deregulation if he or his firm ultimately is awarded the contract.

8 The Ethics Law defines significant participation as:

direct administrative or operating authority to approve, disapprove, or otherwise decide government action with respect to a specific matter, whether the authority is intermediate or final, exercisable alone or with others, and exercised personally or through subordinates. It ordinarily does not include program or legislative oversight, or budget preparation, review, or adoption.

§19A-13(c)